RECORD AND BRIEFS

No. 16-111

Supreme Court, U.S.
FILED
OCT 30 2017
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

MASTERPIECE CAKESHOP, et al.,

Petitioners,

v.

COLORADO CIVIL RIGHTS COMMISSION, et al.,

Respondents.

On Writ of Certiorari to the Colorado Court of Appeals

BRIEF FOR *AMICI CURIAE* GLBTQ LEGAL ADVOCATES & DEFENDERS AND NATIONAL CENTER FOR LESBIAN RIGHTS IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

GLBTQ Legal Advocates & Defenders ("GLAD"), a non-profit legal organization engages in litigation, public policy advocacy and education, to create a just society free of discrimination based on gender identity and expression, HIV status, and sexual orientation. GLAD has litigated cases representing same-sex couples seeking the freedom to marry and respect for their marriages from states and the federal government, including at this Court in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). Since 1978, GLAD has represented lesbian, gay, bisexual and transgender ("LGBT") individuals and their families in all manner of cases in state and federal courts to establish our equal citizenship and freedom from discrimination in all aspects of life.

The National Center for Lesbian Rights ("NCLR") is a national non-profit legal organization dedicated to protecting and advancing the civil rights of lesbian, gay, bisexual, and transgender people ("LGBT") and their families through litigation, public policy advocacy, and public education. Since its founding in 1977, NCLR has played a leading role in securing fair and equal treatment for LGBT people and their families in cases across the country involving

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[1] Pursuant to Rule 37.6, *amici curiae* certify that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amici* or their counsel, has made a monetary contribution to the preparation or submission of this brief. Sup. Ct. R. 37.6. Pursuant to Rule 37.2(a), all parties received timely notice and consented to the filing of this Brief. Petitioners' and respondents' consent has been filed with the Clerk with this brief.

constitutional and civil rights. NCLR has a particular interest in promoting equal opportunity for LGBT people in public accommodations through legislation, policy, and litigation. NCLR represents LGBT people in discrimination and other cases in courts throughout the country, and was counsel for the respondent-intervenor in *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010).

SUMMARY OF THE ARGUMENT

Amici agree with respondents that applying the Colorado Anti-Discrimination Act to prohibit a commercial bakery from refusing to make a wedding cake for a same-sex couple, as it would for any similarly situated heterosexual couple, does not violate the First Amendment. *Amici* submit this brief to highlight the serious harms that recognition of a constitutionally-compelled exemption to anti-discrimination statutes would impose on lesbian, gay, bisexual, and transgender (LGBT) people, other groups, and the broader society.

Anti-discrimination laws like the Colorado Anti-Discrimination Act seek to assure citizens access to, and equal enjoyment of, the fundamental elements of full participation in civic life: access to homes, jobs, and public accommodations. The States, including Colorado in 1885, began passing such measures after this Court ruled that Congress lacked the power to prohibit discrimination in public accommodations. *Civil Rights Cases*, 109 U.S. 3, 25 (1883); *see* Brief of Colorado Organizations and Individuals as *Amici Curiae* in Support of Respondents at I.B. (detailing history of the Colorado

anti-discrimination laws). With our country's evolution from an agrarian to a market-based economy, the proliferation of places for entertainment and amusement, the availability of new goods and services, and recurring concerns about discrimination, States and municipalities expanded the reach of these laws to ensure that individuals in socially marginalized groups could have full and equal enjoyment of places that sell goods or services to the public. *See Romer v. Evans*, 517 U.S. 620, 628 (1996); Brief of County of Santa Clara *et al.* as *Amici Curiae* in Support of Respondents at 12-16.

These protections, as well as this Court's decisions in *Romer*, *Lawrence v. Texas*, 539 U.S. 558 (2003), *United States v. Windsor*, 133 S. Ct. 2675 (2013), and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), and other cases, have made deeply meaningful changes in LGBT people's lives, enabling them to live more openly and moving them closer to equal citizenship. The exemption sought here would reverse that trajectory. In the past, this Court has rightly rejected requests to create religious or expressive exemptions to anti-discrimination laws. Nothing about this case—or the inclusion of sexual orientation in state anti-discrimination laws—warrants this Court's departure from that precedent here.

Petitioners' argument is predicated on a faulty distinction between discrimination based on the status of being a gay person, which they claim is not at issue here, and discrimination based on the conduct of marrying a same-sex partner, for which they seek constitutional license. This Court has rejected the purported distinction between sexual orientation as a

status and same-sex conduct in prior decisions, and it should do so here, as well. Marrying a same-sex partner is no more distinguishable from a person's sexual orientation than is same-sex intimacy, as in *Lawrence*, or "unrepentant homosexual conduct," as in *Christian Legal Society v. Martinez*, 561 U.S. 661, 672 (2010).

The exemption sought by petitioners would expose many more LGBT people to the specter of discrimination and the attendant pressure to hide their identities and their relationships to avoid it. A constitutionally-based exemption from laws that prohibit sexual orientation discrimination would authorize—and thus encourage—the denial of equal service to those who are known or discovered to be gay. *Cf. Lawrence*, 539 U.S. at 575 (holding that laws expressing disapproval of "homosexual conduct" are "an invitation to subject homosexual persons to discrimination both in the public and in the private spheres"). Many more LGBT people, and their families and children, would daily be forced to wonder whether they will be turned away and humiliated when out shopping with their children, buying flowers or jewelry to celebrate an anniversary, or engaging in any of the "almost limitless . . . transactions and endeavors that constitute ordinary civic life in a free society." *Romer*, 517 U.S. at 630. The stigmatizing impact on LGBT youth, who still face formidable barriers to their safety and inclusion in schools and other settings, would be particularly severe.

The exemption petitioners seek would undermine the compelling goals of public accommodation laws, which were enacted based on the recognition that the

discrimination they prohibit "both deprives persons of their dignity and denies society the benefits of wide participation in political, economic and cultural life." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624, 626 (1984). The harmful impact of such an exemption could not be cabined either to LGBT people or even to public accommodations laws, nor is it realistic to assume that the market would redress the increased discrimination that would result.

We urge this Court to reject a rule that would constitutionalize a new right for commercial enterprises to discriminate against individuals because of their membership in a particular group.

ARGUMENT

I. THE PROPOSED SPEECH AND RELIGIOUS EXEMPTION WOULD DENY THE "FULL PROMISE"[2] OF LIBERTY AND EQUALITY TO LGBT PEOPLE

A. This Court's Rulings, Along With Political, Cultural And Other Legal Changes, Have Moved LGBT People Closer To Equal Citizenship

Four landmark rulings from this Court have established the principle that LGBT people are as protected by the Constitution as others, and that there is nothing about a person's sexual orientation or

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[2] *Obergefell*, 135 S. Ct. at 2600.

involvement in a same-sex relationship that justifies disparate treatment of LGBT people in their daily lives and relationships. Along with political, cultural and other legal changes, these rulings have transformed the lives of LGBT people in our Nation, creating an incipient equal citizenship that many dared not hope for in their lifetimes. *See, e.g.*, Brief of *Amici Curiae* Services and Advocacy for Gay, Lesbian, Bisexual and Transgender Adults and American Society on Aging In Support of Respondents at 6. By eliminating many forms of governmental discrimination, these decisions have given LGBT people new freedom to participate openly as equal, respected and contributing members of our society. This, in turn, has helped ameliorate private prejudice and bias in society more broadly.

The first of these key rulings was *Romer*, decided before sexual orientation was added to the Colorado Anti-Discrimination Act as a protected characteristic. *Romer* struck down a state constitutional amendment that forbade any "protected status or claim of discrimination" on the basis of "homosexual, lesbian or bisexual orientation, conduct, practices, or relationships." 517 U.S. at 624. By withdrawing—only from gay people—legal protection for injuries caused by public and private discrimination, the amendment "deem[ed] a class of persons a stranger to its laws." *Id.* at 635. This Court's equal protection ruling established that gay people were no longer to be considered strangers to the Constitution either. *Id.*

Construing the Constitution's "liberty" guarantee in *Lawrence*, this Court ruled that gay people may engage in "intimate conduct with another person"

without criminal sanction. 539 U.S. at 567. Before *Lawrence*, States' ability to criminalize the very existence of same-sex relationships was used to justify anti-gay discrimination in virtually every arena, from family law to immigration to military service to employment. *Id.* at 581-82.[3] In *Bowers v. Hardwick*, 478 U.S. 186 (1986), the Court had expressly endorsed the proposition that moral condemnation of "homosexuality" was a sufficient basis for such disparate treatment. *Id.* at 196. In *Lawrence*, the Court recognized that *Bowers'* endorsement of that view was "not correct when it was decided, and it is not correct today." *Lawrence*, 539 U.S. at 578. The Court rejected the notion that moral condemnation can justify the denial of equal liberty to gay people or the disparate treatment of same-sex intimacy. *Id.* at 577-78. The Court's holding effected a paradigm shift: the government (and private parties) could no longer assume that moral views—including those underlying laws that previously criminalized the "conduct that defines the class," *Romer*, 517 U.S. at 641 (Scalia, J., dissenting) (citation omitted)—could justify discrimination against LGBT people.

In *Windsor*, the Court confronted the devastating impact of the federal Defense of Marriage Act

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[3] *See, e.g., Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989); *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987); *Weigand v. Houghton*, 730 So. 2d 581, 590 (Miss. 1999); *Constant A. v. Paul C.A.*, 496 A.2d 1, 4-5 (Pa. 1985); *cf. Boutilier v. Immigration & Naturalization Serv.*, 387 U.S. 118, 120 (1967) (upholding a gay man's deportation on the grounds that his sexual orientation rendered him a "psychopathic personality").

("DOMA") on LGBT people who had legally married under state laws. By permitting same-sex couples to marry, these States had enabled them to "affirm their commitment" publicly and to "live with pride in themselves and in their union in a status of equality with all other married persons." *Windsor*, 133 S. Ct. at 2689. DOMA's mandated federal non-recognition of these marriages countermanded that equal freedom, relegating same-sex couples to a "second-tier marriage," telling "those couples, and all the world," of their unworthiness, diminishing "the stability and predictability of basic personal relations," "demean[ing] the couple, whose moral and sexual choices the Constitution protects," and "humiliat[ing]" and confounding their children as to the "integrity . . . of their own family." *Id.* at 2694. The Court held that denying federal protections and "treating those persons as living in marriages less respected than others" violated the Fifth Amendment. *Id.* at 2696.

In *Obergefell*, the Court drew on these same principles of equal citizenship in holding that LGBT people have a constitutional right to marry, rooted in both liberty and equal protection, on the same terms and with the same protections and responsibilities as others. 135 S. Ct. at 2605. It held that the exclusion of same-sex couples from the freedom to marry both denied them "the constellation of benefits that the States have linked to marriage" and taught "that gays and lesbians are unequal in important respects." *Id.* at 2601-02. The Court also recognized that the right to live and be respected as a legally married couple when traveling or moving across state lines is an essential component of equality. *See id.* at 2607-08.

Together, these decisions have transformed LGBT people's lives in profound ways. While significant barriers to full equality remain, the goal of being included as equal, respected, and participating members of society is closer for many LGBT people than ever before in our Nation's history. These changes have been particularly important for LGBT youth, who long to grow up in a world free from violence and discrimination because of who they are, and in which they can live openly, interact on equal terms with their peers, and reach their full potential as individuals. The rule sought in this case would undermine that progress, forcing many back into hiding and disrupting the ability "to lead more open and public lives," *Obergefell*, 135 S. Ct. at 2596, that this Court's decisions have fostered.

B. Discomfort With, Or Opposition To, The Equal Citizenship Of LGBT People Is No Basis For Allowing Status-Based Discrimination In The Public Marketplace

Amici are well aware that we are in a particular moment historically where there have been great changes in the legal status of LGBT people. Some are deeply uncomfortable with these changes, perhaps even more so as they feel their beliefs challenged. *See Windsor*, 133 S. Ct. at 2689. Existing law provides a solid, well-tested framework to meet such challenging times. Currently, same-sex couples may legally marry, and yet each faith can decide which marriages to celebrate. Federal law forbids job discrimination on the basis of race, color, religion, sex, national origin,

and disability,[4] and yet these laws allow religious employers to favor co-religionists in hiring.[5] In addition, religious groups and institutions have an absolute right to hire and fire their ministers. *Hosanna-Tabor v. Equal Employment Opp'ty Comm'n*, 565 U.S. 171 (2012).

At the same time, most rightly assume that businesses operating in the public marketplace are and should be open to all, and that we may all seek out and obtain the goods and services we need and use in our daily lives. Those rights of equal enjoyment of goods and services are guaranteed by federal law in particular places with regard to a patron's race, color, religion, or national origin. 42 U.S.C. § 2000a. State public accommodations laws often reach more broadly, ensuring access to and enjoyment of a larger range of businesses and public places, and typically protect against discrimination based not only on race and religion, but also sex, and, increasingly, sexual orientation and gender identity.

Within this framework, many people of faith are engaging within and outside their religious communities on issues concerning LGBT people and same-sex relationships. People of diverse faiths, as

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[4] Title VII of Civil Rights Act of 1964, Pub. L. 88-352, codified at 42 U.S.C. § 2000e *et seq.*; Americans with Disabilities Act of 1990, Pub. L. 101-336, codified at 42 U.S.C. § 12101 *et seq.*

[5] 42 U.S.C. § 2000e-1(a); 42 U.S.C. § 12113(d).

well as many LGBT people—who themselves often are people of faith—continue to seek common ground and mutual respect as the law increasingly recognizes the equal citizenship of LGBT people and the equal status of their relationships. This Court should allow continued development and exploration of democratic options rather than short circuit the process of creating laws and policies that respect both religious belief and principles of nondiscrimination.[6]

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[6] Some of petitioners' *amici* claim that the exemption petitioners seek would benefit LGBT people by hastening the enactment of laws prohibiting sexual orientation discrimination in conservative States that otherwise are reluctant to enact such laws. *See, e.g.*, Brief of *Amici Curiae* Utah Republican State Senators in Support of Petitioners at 21-25 [hereinafter "Brief of Utah Republican State Senators"]. In fact, however, those States have chosen not to enact anti-discrimination laws protecting LGBT people at all, despite having the legislative majorities to ensure that any such laws would include broad religious exemptions. That claim is also belied by the opposition of many of petitioners' *amici*, as well as petitioners' counsel, to the enactment of any legal protections for LGBT people and their continuing opposition to this Court's recognition that same-sex couples have a constitutionally protected right to engage in consensual adult sexual intimacy, to marry, and to enjoy the same parental protections as others. *See, e.g.*, Craig Osten and Norman Sears, *The Homosexual Agenda: Exposing the Principal Threat to Religious Freedom Today* (2003) (describing the Alliance Defense Fund's decades of litigation and legislative advocacy opposing the decriminalization of same-sex intimacy, marriage equality for same-sex couples, and anti-discrimination laws protecting LGBT people); Sarah Kramer, *The Unfairness of "Fairness for All" Legislation* (June 8, 2017), available at

In previous decisions, this Court has acknowledged the freedom of religious and moral belief while declining to allow those beliefs to define or limit the rights of others. *Romer* rejected the proffered justification of "respect" for the "liberties" and "freedom of association" of landlords and employers "who have personal or religious objections to homosexuality" as a legitimate basis for discrimination. 517 U.S. at 635. *Lawrence* recognized that "homosexual conduct" had been condemned as immoral, a view "shaped by religious beliefs . . . and respect for the traditional family," but refused to allow the imposition of those views "on the whole society," recognizing its obligation to "define the liberty of all." *Lawrence*, 539 U.S. at 571 (citation and internal quotation marks omitted). The concurrence in *Lawrence* observed that the Court has "never held that moral disapproval, without any other asserted state interest," is sufficient under equal protection "to

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https://www.adflegal.org/detailspages/blog-details/allianceedge/2017/06/08/the-unfairness-of-fairness-for-all-legislation; Ryan T. Anderson & Robert P. George, *Liberty and SOGI Laws: An Impossible and Unsustainable "Compromise,"* The Public Discourse (January 11, 2016), available at http://www.thepublicdiscourse.com/2016/01/16225; James Gottry, *SOGI Laws: A Subversive Response to a Nonexistent Problem*, The Public Discourse (Sept. 28, 2016), available at http://www.thepublicdiscourse.com/2016/09/17865/ (Alliance Defending Freedom attorney opposing ant-discrimination laws for LGBT people); Ryan T. Anderson, *Sexual Orientation and Gender Identity (SOGI) Laws Threaten Freedom*, Heritage Report (Nov. 30, 2015), available at http://www.heritage.org/civil-society/report/sexual-orientation-and-gender-identity-sogi-laws-threaten-freedom.

justify a law that discriminates among groups of persons." *Id.* at 582 (O'Connor, J., concurring in the judgment).

Likewise, the Court has held that public and private moral disapproval of same-sex relationships offers no justification for denying same-sex couples equal respect and public recognition of their relationships under the law. *See Windsor*, 133 S. Ct. at 2693 (noting that the House of Representatives justified DOMA, in part, as expressing "both moral disapproval of homosexuality and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality" (quoting H.R. Rep. No. 104-664 at 12-13 (1996))). While differing religious and moral views are entitled to constitutional protection, this Court's decisions establish that such personal opposition to equality for LGBT persons and their relationships, "enacted [as] law and public policy," improperly places the State's "imprimatur . . . on an exclusion that . . . demeans or stigmatizes" others. *Obergefell*, 135 S. Ct. at 2602.

C. The Proposed Exemption Would Undermine Legal Equality for LGBT People and Reimpose an Inferior Status

1. Petitioners' claim that denying wedding-related services to a gay couple is based on conduct rather than status relies on a distinction that this Court has rejected

Petitioners seek to revive moral disapproval as a legally-sufficient basis for the disparate treatment of gay people. The Colorado Court of Appeals'

determination that the denial of services in this case was discrimination based on sexual orientation is binding as a matter of state law. Nonetheless, petitioners and many of their *amici* devote considerable space to arguing that no such discrimination occurred. They argue that Craig and Mullins were not denied services at the bakery because of their status as gay persons, but because Phillips "could not in good conscience create a wedding cake that celebrates their marriage." Pet. Br. 11. *See also* Brief of *Amici Curiae* 34 Legal Scholars in Support of Petitioners at 3 (arguing that Phillips does not "refuse[] to serve people who are . . . gay. He . . . objects to using his artistic gifts to design and create cakes . . . that send messages contradicting his traditionalist Christian convictions.").

Petitioners' argument is premised on an untenable distinction between discrimination based on the "status" of being gay and discrimination based on the "conduct" of marrying a same-sex partner, a timeworn conception that this Court long ago rejected. In *Christian Legal Society*, a religious student organization argued that it did not exclude members because of their sexual orientation, but because of "a conjunction of conduct and the belief that the conduct is not wrong." 561 U.S. at 689. The Court rejected the argument that there was a constitutionally relevant difference, for purposes of the group's claim that its First Amendment rights had been violated, between discrimination based on the status of being gay and discrimination based on "unrepentant homosexual conduct." *Id.* at 672. The Court held that "[o]ur decisions have declined to distinguish between status

and conduct in this context." *Id.* at 689 (citing *Lawrence*, 539 U.S. at 575); *see also Romer*, 517 U.S. at 642 (Scalia, J., dissenting) (noting lower court's conclusion that "orientation, conduct, practices and relationships" are different ways of "identifying the same class of persons" (quoting *Evans v. Romer*, 882 P.2d 1335, 1349-50 (Colo. 1994)).

Marrying a same-sex partner is just as closely tied to sexual orientation as the conduct at issue in *Christian Legal Society* and *Lawrence*. For this reason, denying service to a gay couple because of a personal objection to their marriage, where the business would serve an opposite-sex couple in comparable circumstances, is status-based discrimination.

2. *The proposed exemption will make full legal equality impossible for LGBT people*

Providing the exemption petitioners seek would significantly erode the progress LGBT people have made toward equal citizenship. It would make impossible the realization of *Obergefell*'s promise that the marriages of same-sex couples are entitled to "equal dignity in the eyes of the law," 135 S. Ct. at 2608, because States would be forbidden from guaranteeing them that equal dignity even in the simple act of patronizing a business open to the public. Under that regime, LGBT people would no longer be assured of a life where "central precepts of equality" and "the full promise of liberty" are guaranteed to them and enforced by law. *Id.* at 2600, 2604.

The proposed exemption would expose same-sex couples and their families to daily vulnerability to discrimination. As Professor Joseph Singer asks, "What does it mean never to know, when one enters a store, whether one is welcome? How does it affect us if we cannot count on being able to buy food, or clothing, or a computer? How will our life chances and worldview change if our ability to obtain the thing we need depended on how much prejudice there was against us?" Joseph William Singer, *We Don't Serve Your Kind Here: Public Accommodations and the Mark of Sodom*, 95 B.U. L. Rev. 929, 946 (2015) [hereinafter "Singer, *We Don't Serve Your Kind Here*"]. Under the proposed exemption, LGBT people and, inevitably, others as well, would be forced to live with that everyday apprehension and uncertainty.

This Court's decisions have enabled many LGBT people to live openly, with diminished fear of discrimination. That freedom now includes the right of same-sex couples to marry and to "live with pride in themselves and their union and in a status of equality with all other married persons." *Windsor*, 133 S. Ct. at 2689. It also includes the right to raise children and to live in any part of this country, secure in the knowledge that their marriages and parental rights must be respected in every state. *See Obergefell*, 135 S. Ct. at 2607-08; *V.L. v. E.L.*, 136 S. Ct. 1017, 1019 (2016) (holding that Alabama could not deny full faith and credit to a same-sex parent's adoption judgment granted in another state); *Pavan v. Smith*, 137 S. Ct. 2075, 2077 (2017) (holding that Arkansas must treat married same-sex parents equally). The Court should decline petitioners' invitation to create an exemption

that would reimpose on LGBT people the "separate status," *Windsor*, 133 S. Ct. at 2693, and exclusion from basic institutions of social life that this Court's decisions from *Romer* to *Obergefell* have done much to remedy.

II. THE CREATION OF A CONSTITUTIONAL EXEMPTION TO NEUTRAL PUBLIC ACCOMMODATIONS STATUTES WOULD HARM LGBT PEOPLE AND OPEN THE DOOR TO INVIDIOUS DISCRIMINATION AGAINST OTHER GROUPS

A. Public Accommodations Statutes Further A Compelling State Interest In Preventing And Remediating The Harmful Effects Of Invidious Discrimination

Petitioners and their *amici* trivialize the pernicious effects of invidious discrimination by arguing that the harms caused by discrimination based on sexual orientation are solely dignitary and "do not rise to a compelling level." Pet. Br. 55. These arguments amount to a rejection of the long-accepted foundation of public accommodations statutes—that discrimination on the basis of protected characteristics imposes significant personal and social harms—and propose a radical departure from more than 50 years of American legal thinking and deeply rooted social norms. Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 Nw. U. L. Rev. 1283, 1448 (1996) (noting that "current settled values" recognize that "[m]embers of the public have a legitimate interest in not being excluded from access to the marketplace

solely on the basis of group membership or immutable individual characteristics"). By advancing the aims of "eliminating discrimination and assuring . . . equal access to publicly available goods and services," state public accommodations statutes "serve[] compelling state interests of the highest order." *Roberts*, 468 U.S. at 624; *see also Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987).

The Court long has acknowledged the State's interest in redressing the full range of harms caused by invidious discrimination, including the injury to personal dignity when individuals are denied the ability to purchase a good or service because of their membership in a particular group. *See Heart of Atl. Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964) (recognizing that the "fundamental object" of anti-discrimination statutes is "to vindicate the deprivation of personal dignity that surely accompanies denials of equal access to public establishments" (citation and internal quotation marks omitted)). The Court has recognized that such denials also inflict significant material harms. In addition to being demeaned by unequal treatment, those denied the ability to buy a good or service from a public accommodation bear the practical burden of identifying potential replacement goods and services, travelling to those substitute locations, and then hoping, without any guarantee, they will not be excluded again and forced to repeat the same process. These harms are suffered personally and immediately, with those excluded lacking any ability to predict with certainty when they might be inflicted again in the future, and carrying with them the psychic costs of

that uncertainty. Public accommodations statutes seek to eliminate this demeaning uncertainty and the stigma and material inequality that it perpetuates. *See Roberts*, 468 U.S. at 626 (stating that a primary purpose of public accommodations laws is to guarantee individuals "equal access to [publicly available] goods, privileges, and advantages").

Exclusion from places of public accommodation also inflicts social harms by reducing the opportunities for Americans to come together in shared civic spaces that are open to all on equal terms. In our society, ordinary life for most people requires frequent interactions with marketplace actors like Masterpiece Cakeshop and the providers of other goods and services. Individuals who are denied equal access to these channels of commerce because of their membership in a particular group are barred from full participation in one of the most important aspects of our shared civic life. The freedom to participate equally in public institutions such as elections, jury duty, and military service ensures that individuals have full access to foundational aspects of self-government and American society. The freedom to participate equally in the marketplace is just as essential, as it ensures access to the diverse social interactions that rise from that foundation. The marketplace serves not only to sustain our material needs, but to bring together diverse groups of Americans. Excluding individuals from the marketplace on the basis of group membership or immutable characteristics reduces the opportunities for all Americans to interact and forge bonds with

those we might not otherwise encounter outside of the commercial sphere.

In *Roberts*, this Court recognized that public accommodations laws address these serious social harms. Discrimination in the sale of goods and services not only "deprives persons of their individual dignity" but also "denies society the benefits of wide participation in political, economic, and cultural life." *Roberts*, 468 U.S. at 625. For this reason, the enactment of public accommodations statutes and their expansion to include additional protected characteristics "reflect[] a recognition of the changing nature of the American economy and of the importance, both to the individual and to society, of removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups." *Id.* at 626; *Bd. of Dir's of Rotary Int'l*, 481 U.S. at 549.

B. The State's Interest In Combating Discrimination Against LGBT People Is Compelling

The state's interest in combating the harms caused by invidious discrimination is no less compelling simply because discrimination against LGBT people is not identical to that experienced by other groups. Discrimination against different groups often takes different forms. The State's interest in prohibiting invidious discrimination is based on the serious harms such discrimination causes—not on the precise form different types of discrimination may take.

In *Obergefell*, the Court acknowledged many features of sexual orientation that are shared with other characteristics that the Court has held are

impermissible bases for discrimination. First, "sexual orientation is both a normal expression of human sexuality and immutable." *Obergefell*, 135 S. Ct. at 2596; *see also id.* at 2594. Second, "[t]here is no difference between same- and opposite-sex couples" with respect to their fitness to be included in social institutions such as civil marriage. *Id.* at 2601. Third, gay people long have been marked as outsiders and excluded from many aspects of our common social life. "For much of the 20th century . . . homosexuality was treated as an illness" or a "mental disorder." *Id.* at 2596. LGBT persons were considered perverted or defective, and, if discovered, "condemned as immoral by the state itself in most Western nations." *Id.* Based on these views, gay people have been subject to widespread discrimination. *See id.* ("Gays and lesbians were prohibited from most government employment, barred from military service, excluded under immigration laws, targeted by police, and burdened in their rights to associate."). Fourth, while gay people have progressed from "outlaw" to "outcast," they have not yet achieved "the full promise of liberty." *Id.* at 2600.

Given this long and continuing history of discrimination, it is not enough to say that the marketplace will "take care of it," as urged by some of petitioners' *amici*. *See* Brief of *Amici Curiae* Law and Economics Scholars in Support of Petitioners at 16 (contending that "the market ensure[s] that those seeking services will find well-matched providers"). "The idea that one can 'just go elsewhere' misses the point entirely. The question is not whether one can find a store willing to let you in and treat you with

dignity. The question is whether one has a right to enter stores without worrying about such things." *See* Singer, *We Don't Serve Your Kind Here*, 95 B.U. L. Rev. at 938 (internal emphases removed). Even if it is true that goods or services can be obtained elsewhere (which may or may not be the case in a given geographic area), that does not remedy either the "deprivation of personal dignity," *Heart of Atl. Motel*, 379 U.S. at 250, or the destructive impact on "participation in political, economic, and cultural life," *Roberts*, 468 U.S. at 625, that accompanies discrimination in public accommodations.

Moreover, the argument that markets will redress discrimination does not account for the lived experience of many LGBT people. Petitioners and their *amici* rely on data concerning the availability of bakeries willing to serve LGBT people in Denver, one of the largest metropolitan areas in the United States; however, many LGBT Americans live in areas far less accepting of LGBT people, significantly limiting their options in the marketplace and exposing them to the most virulent forms of discrimination. *See, e.g.*, Gary J. Gates & Abigail M. Cooke, *United States Census Snapshot: 2010*, The Williams Institute at 1, 5-6 (Sept. 2011), available at: https://williamsinstitute.law.ucla.edu/wp-content/uploads/census2010Snapshot-USv2.pdf (reporting that LGBT people live in almost every county of every state); The Williams Institute, *LGBT in the South* (March 2016), available at: https://williamsinstitute.law.ucla.edu/research/census-lgbt-demographics-studies/lgbt-in-the-south (noting that 35 percent of the LGBT population lives in Southern states). Indeed, certain *amici* for

Petitioners acknowledge that, in communities with low political support for LGBT rights, discrimination on the basis of sexual orientation gives rise to "potential abuses that most Americans would find deplorable." Brief of Utah Republican State Senators at 16 (listing examples); *see generally* Frank Bruni, *The Worst (and Best) Places to Be Gay in America*, N.Y. Times (Aug. 25, 2017), available at https://www.nytimes.com/interactive/2017/08/25/opinion/sunday/worst-and-best-places-to-be-gay.html?_r=0 (describing great regional variation in the experiences of LGBT persons). Especially for LGBT people who live in such places, the notion that the market is sufficient to deter discrimination is a painful fiction.

If this Court were to recognize the exemption that petitioners seek, it would increase the discrimination faced by LGBT people. Inevitably, some business owners who have the same beliefs as Phillips but do not discriminate against same-sex couples or LGBT people now, because they recognize that doing so is not lawful, would do so if this Court rules that it is permissible. Similarly, a ruling that endorsed the view—heretofore rejected by this Court's precedent—that providing equal services to all customers is somehow an expression of the seller's own personal or religious beliefs would create new incentives and pressures to discriminate. For example, business owners who wish to be regarded as faithful adherents to their religion but have no desire to discriminate against LGBT customers would face new social pressure to do so in order to demonstrate their religious faith. And because being LGBT is not an

immediately visible trait, LGBT people would face increased pressure to hide their identities in order to avoid triggering this bias.

Historically, the pressure to conceal one's sexual orientation to avoid discrimination has harmed gay people in serious ways. Such invisibility has "high personal costs," as well as "high aggregate costs for gay men and lesbians, whose social presence is obscured and sometimes erased entirely under the force of this pressure." Jane S. Schacter, Romer v. Evans *and Democracy's Domain*, 50 Vand. L. Rev. 361, 369 (1997). This pressure has often prevented gay people from living normal lives, showing others that they are productive and responsible members of society, or advocating for themselves openly in the political process. *Id.* at 371 (noting that the pressure to hide one's identity means that gay people "are coerced to live in conditions not imposed on heterosexuals" and to maintain the invisibility that contributes to and perpetuates inequality). The proposed exemption would increase this pressure and other serious harms inflicted on LGBT people, and society at large, by permitting and thereby encouraging more acts of discrimination.

C. The Constitutional Exemption Petitioners Seek Cannot be Limited to Denials of Service to Same-Sex Couples or LGBT People

A constitutional exemption from public accommodations laws based on a business owner's religious or moral views cannot be limited to the context of LGBT persons or even public accommodations laws generally. Indeed, such an

exemption would inevitably spill over into other types of anti-discrimination laws and other forms of discrimination.

As an initial matter, petitioners' sought-after exemption cannot be cabined only to goods and service relating to the weddings of same-sex couples. The religious viewpoints animating petitioners' refusal to provide Craig and Mullins with a cake for their wedding reception might equally animate a refusal to provide a same-sex couple with cakes celebrating their anniversary, the birth or adoption of a child, or even the child's birthday. Discrimination in those contexts would inflict the same material and stigmatic harms on children that the Court found constitutionally unacceptable in *Obergefell*. *Obergefell*, 135 S. Ct. at 2590 (discussing harmful effect of discrimination against same-sex couples on their children). Petitioners thus cannot characterize their request for an exemption from public accommodations law as merely a line-drawing exercise designed to balance the interests of LGBT and non-LGBT Americans; even the narrowest articulation of the exemption petitioners seek will reach beyond the lives of LGBT persons to harm their children, families, and friends.

The exemption that petitioners seek would also apply to other anti-discrimination laws, outside the context of public accommodations, including, for example, laws prohibiting discrimination in employment and housing. Those opposed to the marriages of same-sex couples may see it as a violation of conscience, as Phillips does here, to confer benefits upon or associate with those who do not act

in accordance with those views. If petitioners may refuse to sell Craig and Mullins a cake because they object to their marriage, why could they not also refuse to hire one of them as an employee because they object to their marriage? Why could they not refuse to provide the same spousal benefits to same-sex spouses of employees that are available to other spouses?

Finally, an exemption from public accommodations law based on religious objections also opens the door for discrimination against other traditionally marginalized groups. Advocates of racial discrimination and segregation, for instance, historically relied on widespread, deeply entrenched interpretations of religious doctrine to support their views. *See, e.g.*, William N. Eskridge, Jr., *Noah's Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms*, 45 Ga. L. Rev. 657, 672-77 (2010-2011) (describing the prominence of religion-based objections to desegregation and noting that the enactment of the Civil Rights Act of 1964 "triggered a wave of legal clashes between civil rights for blacks and religious liberty of some religious whites"); *Loving v. Virginia*, 388 U.S. 1, 3 (1967) (quoting trial court ruling that stated "'Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. ... The fact that he separated the races shows that he did not intend for the races to mix.'"). Similarly, discrimination against women has often been supported by widely shared religious views. *See, e.g.*, *Bradwell v. Illinois*, 83 U.S. 130, 141 (1873) ("The paramount destiny and mission of woman are to

fulfil the noble and benign offices of wife and mother. This is the law of the Creator."). This Court has rightly rejected the invocation of such religious views as a sufficient basis for non-compliance with anti-discrimination laws in other contexts and it should do so here as well.

The arguments presented by petitioners and their *amici* are not new, nor is this the first time in our Nation when the discomfort, fear or misunderstanding of some, and outright hostility of others, has threatened to create a legal regime that would exclude particular groups from full participation in civic life. The exemption petitioners seek would stigmatize and disadvantage LGBT people, just as they are beginning to make meaningful strides toward full and equal citizenship and are able to contribute more fully to their communities. We urge this Court to refrain from creating the constitutional exemption requested and to reaffirm the longstanding principle that laws prohibiting discrimination in public accommodations permissibly regulate the harms caused by discrimination and do not implicate First Amendment rights.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the Colorado Court of Appeals.

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